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G.P.-S.384-1952-3-10,000. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKl.

Capital

JOHANNES HLATSWAYO

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appelant

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on: Wednesday 30th Nov, 1955.
Op die rol geplaas vir verhoor op:—

(TPD.)

9.45 – 10.45 – CAV.

Appeal dismissed.

Schreiner, etc. ...
Reynolds, ..., T.J.A.)

Registrar
2/12/55

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

JOHANNES HLATSWAYO Appellant

and

R E G I N A Respondent

Coram: Schreiner, van den Heever, Reynolds, de Villiers et Hall, JJ.A.

Heard: 30th. November, 1955. Delivered: 2 - 12 - 1955

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted of murder by a court consisting of LUDORF J. and assessors, sitting in the Volksrust Circuit Local Division. No extenuating circumstances were found and the appellant was sentenced to death. LUDORF J., however, granted leave to appeal on the question of extenuating circumstances. In doing so the learned judge was apparently influenced by the submission of counsel for the appellant that the trial court had applied an objective instead of a subjective test in deciding whether to find extenuating circumstances; the correctness or incorrectness of this approach the learned judge regarded as raising a question of law and for this

reason/.....

reason he granted leave to appeal.

The facts are simple and practically undisputed. The appellant had lobolaed a young woman named Kesaya who must be regarded as if she was his wife, though the marriage ceremony had not been celebrated. Their home was at Sterkfontein in the Volksrust district but the appellant used to go to Johannesburg to work. On Saturday, the 9th July 1955, on his return from Johannesburg, he was told by his mother that the grandmother of the deceased had told her that Kesaya had had a love affair with the deceased and was pregnant by him. The appellant in his mother's presence taxed Kesaya, but she denied the story and according to her and the appellant's mother he seemed to accept her denial. He and Kesaya slept together as man and wife that night. The following morning the appellant enquired from a young native named Booi as to the whereabouts of the deceased. The appellant said that he received confirmation from Booi that the deceased and Kesaya were in love with each other. Booi denied this in evidence and the trial court did not find that the appellant's version of the talk with Booi was proved. Having found the deceased at a neighbouring kraal, where he was sitting outside in a yard with three other persons, the appellant, without saying anything beyond reciprocal greetings, drew/.....

,drew a home-made dagger-like knife from his inside jacket pocket and stabbed the deceased in the chest. The deceased got up and received another stab in the middle of the back. As he ran out the appellant stabbed him again in the back, higher up than the second wound. The cause of death was shock and haemorrhage following the first two wounds, which penetrated the heart and the kidneys respectively.

The appellant in his evidence said that he did not believe Kesaya when she denied having had relations with the deceased and that on the following morning he had developed a feeling of blind rage towards the deceased, which led him to seek hi and stab him. He said that he did not intend or expect to kill the deceased.

The part of the judgment dealing with extenuating circumstances is as follows:-

"There remains for us to consider whether the presence "of extenuating circumstances has been proved. The accused "must prove the presence of such circumstances on a balance "of probabilities, and he must prove some circumstance "associated with the crime which lessens the moral guilt of "the deceased accused in the eyes of reasonable men.

"It has been urged upon us by Mr. Korsen that the "accused has discharged this onus because of his belief "that the deceased had committed adultery with his wife. "This belief - so the argument runs - stirred his "jealousy which, in turn enraged him, and that amounted to "an extenuating circumstance.

"We think on the evidence that it is probable that

"the/.....

"the accused did believe that something occurred between the "deceased and his wife. But an examination of the basis of "this belief leaves us in this position, that we think that "the accused has failed to discharge the onus resting upon "him. The allegation of misconduct on the part of his wife "is a hearsay story, and which he knows to be hearsay, told "to him by his mother. His mother knows of no circumstance "justifying a belief in such a story. His wife, who was a "perfectly satisfactory witness and who frankly admitted em- "barrassing facts about her life prior to her living with the "deceased accused, denies that anything of the sort exists, "and the witness Booi denies that he spoke to the accused "about the alleged misconduct. We see no reason for rejecting "Booi's evidence, nor for rejecting the evidence of both the "wife of the accused and his mother that he apparently accep- "ted his wife's denial and left the matter there.

"Then, not in the heat of the moment but after he had "had time to consider - after he had slept the night - he "proceeded to seek out the deceased and deliberately killed "him. This is not the case of a man who is acting on a sud- "den impulse; if he was jealous he had ample opportunity of "collecting himself and controlling his feelings. We feel "that no reasonable man could have had any reasonable belief "in the truth of the allegations. If he had this belief, "which as I have said we think is probable (although we do "not know whether he did in fact have such a belief) it was "based on the flimsiest of circumstances and to any reasonable "man was devoid of foundation.

"We do not think that reasonable men, knowing these "facts, would come to the conclusion that the accused has "proved that his conduct is morally less blameworthy than had "this belief not existed, and we find that the accused has "failed to prove the presence of extenuating circumstances, "and the supreme penalty will have to be imposed. "

The/.....

The argument for the appellant rested, in effect, on the contention that the trial court had misdirected itself by excluding from consideration the fact that the appellant believed in the guilt of the deceased, because the court thought that his belief was unreasonable. This, it was contended, amounted to applying, wrongly, an objective instead of a subjective test.

We were referred by counsel for the appellant to decisions of this Court in which the subject has been discussed, and in particular to Regina v. Mkize (1952 (2) S.A. 324 at page 336). There have been from time to time been statements in judgments as to the jurisdiction of this Court in questions of this kind, and as to the factors that may properly be taken into account by the triers of fact in deciding whether extenuating circumstances are present or not. But for present purposes it is sufficient to say that on the facts of this case the appellant could not succeed unless he showed that there had been a misdirection of the kind already mentioned. Had LUDORF J. said that the trial court had ruled out of consideration the fact that the appellant believed that the deceased had had intercourse with Kesaya, that would show that there had been a misdirection. LUDORF J. could have put the same thing in another way by

saying/.....

saying that the trial court had concerned itself only with the reasonableness of the appellant's belief and not with his actual belief. And there are no doubt other ways in which it could have been indicated that the trial court had in effect looked at the question of extenuation simply from the angle of what a reasonable man would have done in the circumstances, and not from the angle of what was actually in the appellant's mind at the time and how blameworthy his conduct had been, bearing in mind what he actually believed.

Now LUDORF J. says that the trial court, while accepting the appellant's belief in the deceased's mis-conduct with Kesaya as a fact, considered that he had only the flimsiest grounds for his belief. It seems to me to be clear that the triers of fact are entitled to take account of such considerations. A murderer's moral blameworthiness may legitimately be treated as greater when he has murdered because of his acceptance of gossip to which no reasonable man would give credence, than when he has been given weighty proof of what induced him to murder. That, I think, is substantially all that LUDORF J.'s remarks amounted to. He pointed out that the appellant had not acted at once after receiving the information, that he spent the night with his wife and only the next morning looked for the deceased and

deliberately/.....

deliberately killed him. It is clear that those circumstances weighed with the trial court, which was entitled to take account of them. I am unable to infer from the judgment that the trial court disregarded the fact that the appellant believed that the deceased and Kesaya had misconducted themselves. I understand the learned judge to say that though the appellant had this belief, his conduct in acting, after a substantial interval, upon what was obviously unverified hearsay evidence detracted in the assessment of his moral blameworthiness from the effect of his belief; so that in the circumstances he had not satisfied the court that there were extenuating circumstances.

There was in my view no misdirection and the appeal is accordingly dismissed.

van den Heever J.A.)
Reynolds, J.A.)
de Villiers J.A.) Concur
Hall, J.A.)

O.D. Schreiner
1.12.55

LUDORF, J.: The accused in this case is charged with the crime of murder, the allegation being that on the 10th July, 1955, and at Sterkfontein, in this district, he wrongfully and unlawfully murdered Moses Kupeka.

The defence has admitted that the post-mortem examination held by Dr. MacDonald was held on the body of the deceased, and from the evidence of Dr. MacDonald it is clear that the deceased died as a result of the combined effect of two wounds - both stab wounds, one puncturing the heart and the other puncturing the kidney. There was a third stab wound on the body at the base of the neck.

The accused has admitted the stabbing and has admitted that he inflicted three stab wounds upon the deceased with the knife which has been produced before the Court. This knife is a home-made weapon. It is a piece of steel that has been filed into the shape of a dagger, with a blade of about six inches long.

The evidence for the Crown as to what actually happened has not been disputed by the accused and is to this effect: that on Sunday morning, 10th July, the deceased was sitting with other natives at the home of a native called George. At that stage the accused arrived. This was during the morning and, as the witness Jotham put it, between breakfast time and midday. The accused greeted those seated there and they thereupon exchanged the greeting with him. Without further ado and without saying anything further, the accused pulled out the weapon to which I have referred and stabbed the deceased in his chest while he was still seated. The deceased got up and ran, he was pursued by the accused who inflicted

the two further wounds to the back. The deceased then fell down and died shortly afterwards.

There was other evidence for the Crown, namely that of the wife of the accused and that of a young witness called Booi. It appears from the evidence of these two witnesses that the accused was married by native custom to the witness Kaseya, for whom he had paid lobola. He had left the farm to work in Johannesburg, and had returned on the 9th July for a week-end visit. On the 9th July he taxed his wife, in the presence of his mother, with certain allegations that he had heard of and concerning her and the deceased. The mother of the accused had heard that the accused's wife and the deceased were cohabiting with each other, and that the accused's wife had, as a consequence of this cohabitation, become pregnant to the deceased. These allegations were denied by the accused's wife, and the matter was left there That evening the accused's wife prepared a meal for him, and after the meal they retired to bed and cohabited as man and wife. The accused's wife denied in evidence that there was any foundation at all for this allegation; she denied that she was pregnant to the deceased or at all.

The witness Booi denied that he knew of any improper relationship between the deceased and the accused's wife and said that the accused had not enquired of him about this alleged relationship This witness was not cross-examined.

That constituted the Crown case.

For the defence the mother of the accused was called as a witness. She said that she had heard from the grandmother of the deceased that there had been this improper relationship between the deceased and the

accused's wife. She said that she told her son about it upon his return, that he taxed his wife with the allegation in her presence, the wife denied the allegation and the accused appeared to accept her denial. She says that there was nothing about the conduct of the accused's wife, who lived with her, to give her any reason for attaching any truth to the allegation.

The accused, in giving evidence on his own behalf, says that upon his return on the 9th July he heard of the allegations from his mother, and although his wife denied them he believed them. He says that the next day, when he met the witness Booi, the latter repeated the allegation, and this enraged him to such an extent that he was beside himself and as a consequence he sought out the deceased. He says that when he found the deceased he became so enraged that he was unable to speak to him and that he stabbed him, not intending to kill him and not intending to hurt him over much. He says that he did not think that stabbing a man in the chest with the instrument that I have described could cause death. Asked to point out where a man's heart is, he pointed to the lower left of the abdomen

That constituted the evidence for the defence.

On this evidence Mr. Korsen, on behalf of the accused, found himself unable to contend that the accused is not guilty of murder - while not conceding, he was not able to argue to the contrary

On a consideration of the evidence we have no doubt that the accused is guilty of murder. He stabbed the deceased three times; two of these stab wounds were mortal wounds; the instrument which he used we are satisfied he must have known could cause death, and we do not

believe him when he says that he did not know that by stabbing in the chest with this instrument death could ensue. His conduct in using this knife three times can lead to only one inference, and that is that he must have intended to kill the deceased; and he must have formed this intention some time previously, because when he passed the witness Booi he enquired as to the whereabouts of the deceased, and as soon as he came to the deceased he proceeded to stab him.

As I have said, we have no doubt in the matter and we find the accused guilty of the crime of murder.

There remains for us to consider whether the presence of extenuating circumstances has been proved. The accused must prove the presence of such circumstances on a balance of probabilities, and he must prove some circumstance associated with the crime which lessens the moral guilt of the accused in the eyes of reasonable men.

It has been urged upon us by Mr. Korsen that the accused has discharged this onus because of his belief that the deceased had committed adultery with his wife. This belief - so the argument runs - stirred his jealousy which, in turn, enraged him, and that amounted to an extenuating circumstance.

We think on the evidence that it is probable that the accused did believe that something had occurred between the deceased and his wife. But an examination of the basis of this belief leaves us in this position, that we think that the accused has failed to discharge the onus resting upon him. The allegation of misconduct on the part of his wife is a hearsay story, and which he knows to be hearsay, told to him by his mother. His mother knows of no circumstance justifying a belief in such a

story. His wife, who was a perfectly satisfactory witness and who frankly admitted embarrassing facts about her life prior to her living with the accused, denies that anything of the sort exists, and the witness Booi denies that he spoke to the accused about the alleged misconduct. We see no reason for rejecting Booi's evidence, nor for rejecting the evidence of both the wife of the accused and his mother that he apparently accepted his wife's denial and left the matter there.

Then, not in the heat of the moment but after he had had time to consider - after he has slept the night - he proceeded to seek out the deceased and deliberately killed him. This is not a case of a man who is acting on a sudden impulse; if he was jealous he had ample opportunity of collecting himself and controlling his feelings. We feel that no reasonable man could have had any reasonable belief in the truth of the allegations. If he had this belief, which as I have said we think is probable (although we do not know whether he did in fact have such a belief) it was based on the flimsiest of circumstances and to any reasonable man was devoid of foundation

We do not think that reasonable men, knowing these facts, would come to the conclusion that the accused has proved that his conduct is morally less blameworthy than had this belief not existed, and we find that the accused has failed to prove the presence of extenuating circumstances, and the supreme penalty will have to be imposed.

VERDICT: GUILTY OF MURDER WITHOUT EXTENUATING CIRCUMSTANCES.

(Asked whether he had anything to say why sentence of death should not be passed, the accused